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Supreme Court, U.S.
FILED
931252 DEC 13 1993
OFFICE OF THE CLERK

NO. _____

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1993

THE STATE OF OKLAHOMA,

Petitioner,

v.

SCOTT ALLEN HAIN,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF CRIMINAL APPEALS

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24 pp

QUESTION PRESENTED

Whether the Oklahoma appellate courts ruling that the punishment option of life without parole in First Degree Murder cases should be available to those persons who committed the crime before the life without parole option went into effect, but were tried after the effective date, violates federal and state constitutional principles.

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PETITION FOR WRIT OF CERTIORARI

Petitioner, the State of Oklahoma, by and through Susan Brimer Loving, Attorney General of the State of Oklahoma, respectfully requests that this Court issue a Writ of Certiorari to review the decision of the Oklahoma Court of Criminal Appeals.

OPINION BELOW

The published opinion of the Oklahoma Court of Criminal Appeals is recorded at Hain v. State, 852 P.2d 744 (Okla. Crim. App. 1993).

JURISDICTION

Jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1257 (a).

STATEMENT OF THE CASE

The defendant, Scott Allen Hain, was convicted of two counts of the crime of First Degree Murder in Creek County, Oklahoma, in Case No. CRF-87-240. On October 6, 1987, Hain and his co-defendant, Robert Lambert, kidnapped two young people from the parking lot of a Tulsa nightclub. The victims, Michael William Houghton and Laura Lee Sanders, were placed in the trunk of Sanders' stolen car and ultimately burned to death when Lambert and Hain ignited the car with the two victims still inside the trunk.

In 1987 the Oklahoma legislature amended the punishment statute for First Degree Murder, Okla.Stat. tit. 21 § 701.10 (1981), adding a third, middle range, punishment option of life imprisonment without the

possibility of parole. The amendment's effective date was November 1, 1987, and contained no language regarding retroactive application.

At the time Hain committed the murders of Ms. Sanders and Mr. Houghton, the punishment options for First Degree Murder were life imprisonment or death. By the time the defendant was tried, however, the new amendment had gone into effect adding the third option of life without parole.

In Hain's direct appeal, the Court of Criminal Appeals affirmed his conviction for First Degree Murder but reversed the death sentence imposed by the jury and ordered the case remanded for a new sentencing proceeding, at which time the jury should be given all three sentencing options now available for First Degree Murder, including life without parole.

SUMMARY OF THE ARGUMENT

The Oklahoma appellate court's decision that life without parole is a sentencing option for those persons who committed murder before the effective date of the life without parole amendment violates federal and state constitutional standards of equal protection, and cruel and unusual punishment.

REASONS FOR GRANTING THE WRIT

I.

THE COURT OF CRIMINAL APPEALS DECISION VIOLATES EQUAL PROTECTION BY PROVIDING AN ADDITIONAL SENTENCING OPTION TO PERSONS TRIED AFTER NOVEMBER 1, 1987, WHICH IS NOT AVAILABLE TO SIMILARLY SITUATED PERSONS TRIED BEFORE NOVEMBER 1, 1987.

In the opinion below, the Oklahoma Court of Criminal Appeals found that "principals [sic] of fundamental fairness" compelled them to reverse this case and remand for a new second stage trial since the amendment to Okla.Stat.tit. 21 § 701.10 (1987) providing for the option of life without

parole was in effect at the time of the trial. The Court of Criminal Appeals in its decisions on this issue[1] has impermissibly caused disparate treatment of persons similarly situated. The defendant Hain belongs to a class of criminals who committed First Degree Murder before November 1, 1987. Because he was tried after that date, however, the Court of Criminal Appeals has ruled that he is entitled to a new sentencing proceeding at which he will receive the benefit of a third sentencing option. Other criminals in the class who were tried before November 1, 1987, are not entitled to the same results. A violation of equal protection occurs when the government treats someone

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[1] See also Salazar v. State, 852 P.2d 729, **rehearing denied**, 859 P.2d 517 (Okla. Crim. App. 1993); Wade v. State, 825 P.2d 1357 (Okla. Crim. App. 1992); and Allen v. State, 821 P.2d 371 (Okla. Crim. App. 1991), **rehearing denied**, __ P.2d __, 63 O.B.A.J. 29 (Okla. Crim. App. Jan 4, 1992).

differently then another who is similarly situated. See Cleburne v. Cleburne Living Center, Inc., 473 U.S. 432, 439, 105 S.Ct. 3249, 3254, 87 L.Ed.2d 313 (1985). The State submits that this disparate treatment violates the Fourteenth Amendment to the United States Constitution.

It is completely conceivable that two murderers (perhaps even accomplices in the same act) who committed their crimes before November 1, 1987, will be treated differently under the Court's holding. If Murderer A vigorously pursued his speedy trial rights and was tried before November 1, 1987, he would be entitled to only two sentencing options upon conviction of First Degree Murder, the options of life imprisonment or death. If Murderer B, on the other hand, drug his feet, and obtained a number of continuances so that he were tried after November 1, 1987, he would be entitled to three sentencing options upon

his conviction for First Degree Murder. The disparate treatment of Murderer A and B cannot withstand constitutional scrutiny.

The Court's holding is also flawed because it does not define at what point in the trial the defendant becomes entitled to the life without parole option. Would a trial that began in October, 1987, but in which the sentencing verdict was not rendered until November 1, 1987, come under the terms of the Court's holding, or only those trials in which the proceedings began after November 1, 1987? The Court's decision, in an attempt to provide capital defendants with all possible constitutional entitlement, has created constitutional infirmities where none previously existed.

Since the Court of Criminal Appeals' decision in this case and the Salazar case, the Oklahoma legislature has attempted to remedy the situation by amending Okla.Stat.tit. 21, § 701.10(a) (1981) which

deals with the procedure to be followed in capital cases which have been remanded. Under the new amendment to § 701.10(a), once a case is remanded for resentencing, the defendant shall **not** be entitled to the life without parole option if the crime occurred before November 1, 1987.

Thus, another anomaly has been created. If the Court of Criminal Appeals opinions in Allen, Wade, Hain, and Salazar, stand, then all cases in which the murder occurred before November 1, 1987, but the trial occurred after November 1, 1987, will be remanded for re-sentencing so that the life without parole option may be considered. Under the Legislature's new amendment to § 701.10(a), however, the life without parole option may not be given. Oklahoma prosecutors, defense attorneys, and trial judges will be thrust into the situation of deciding whether to abide by the Court of Criminal Appeals' decisions or the

legislature's statutory law - both cannot be followed.

As further evidence of the muddied legal precedent that the Court of Criminal Appeals has created, in Wade v. State, 825 P.2d 1357 (Okla. Crim. App. 1992), the Court held that, though the defendant was entitled to the life without parole option, he had to specifically request it at trial **and** waive his constitutional right against the application of any ex post facto law. Wade, 825 P.2d at 1363. This request and waiver requirement was not followed in the Hain and Salazar cases.

The Court of Criminal Appeals has unconstitutionally differentiated between similarly situated individuals in an arbitrary and capricious manner with no reasonable basis. It has created legal precedent which is internally inconsistent, illogical, and impossible to follow. This Court should accept this case for review.

II.

THE COURT OF CRIMINAL APPEALS' DECISION IS CONTRARY TO ITS OWN PRIOR HOLDINGS.

In its decisions on this issue, the Court of Criminal Appeals ignored its own well settled law. Oklahoma, like other jurisdictions[2], has always previously held that the punishment in effect **at the time the crime was committed** is the punishment to which the perpetrator should be subjected.

For example, in the case of Pollard v. State, 521 P.2d 400 (Okla. Crim. App. 1974) the petitioner had been sentenced to serve ten (10) years for the crime of Grand Larceny, After Former Conviction of a

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[2]See State v. Hardy, 489 A.2d 508, 512 (Me. 1985); Ruplenas v. Commonwealth, 275 S.E. 2d 628, 632 (Va. 1981); Galbraith v. State, 693 P.2d 880, 882 (Alaska Ct. App. 1985); State v. Zaehringer, 325 N.W.2d 754, 761 (Iowa Ct. App. 1982); State v. Sylva, 795 P.2d 947, 950 (Kan. Ct. App. 1990); State v. Henning, 599 P.2d 318, 329 (Kan. Ct. App. 1979).

Felony. Mr. Pollard's former felony conviction was Possession of Marihuana, which had been subsequently reclassified by the state legislature as a misdemeanor. In rejecting Mr. Pollard's post conviction relief appeal, this Court stated in its syllabus:

1. **The law in force defining a criminal offense at the time the crime was committed is the law governing the classification of the offense and the punishment that can be imposed therefore,** and this is true notwithstanding the enactment of a statute reclassifying the crime and reducing punishment, prior to the trial of the offender, unless such statute contains language expressing the intent of the Legislature that the classification and sentence reduction are to be applied retroactively.

and, ultimately held:

[T]he Legislature may make retroactive a statute lessening the punishment and classification of an offense, but the intent to do so must be affirmatively expressed in said statute.

Pollard, 521 P.2d at 401, 402 (emphasis added).

In the 1912 case of Lilly v.State, 7 Okl.Cr. 284, 123 P. 575 (1912) the

plaintiff had committed the crime of conjoint robbery in January, 1908. At the time of the crime the punishment prescribed was life imprisonment. However, on March 23, 1909, the Legislature changed the punishment from life imprisonment to a term of five (5) to fifty (50) years imprisonment. The appellate court had already ruled that the case had to be sent back for retrial on other grounds, and, having noted that the trial court had improperly instructed the jury on the punishment range of five (5) to fifty (50) years during the first trial, held:

> [T]hat the district court of Lincoln county, upon a retrial of this case, should submit the punishment for conjoint robbery **under the statute as it existed at the time the offense is alleged to have been committed.**

Lilly, 123 P. at 578 (emphasis added).

In the case of Penn v. State, 13 Okl.Cr. 367, 164 P. 992 (1917) the defendant was under eighteen (18) years old and was

charged with statutory rape. The victim was over fourteen (14) years of age. The defendant committed the crime on May 9, 1913. A statute went into effect on May 16, 1913, holding that consensual intercourse under the above facts was not rape. The petitioner contended that he was entitled to the application of the statute which was in effect (the May 16, 1913, statute) at the time of his trial. This Court disagreed, holding:

> **The very minute this crime was committed the defendant became amenable to the law as it then existed.** He then and there by his own voluntary conduct incurred the penalty of that law, and the constitutional provision aforesaid prevents the Legislature of this state from wiping out penalties for crimes committed prior to the taking effect of a repealing statute.
>
> . . .
>
> **We hold, therefore, that this defendant was subject to any penalty imposed by law for this crime on the date of its commission,** and any subsequent statute repealing such penalty can only operate prospectively, and is applicable only to offenses committed after the statute took effect.

Penn, 164 P. at 993 (emphasis added). See also Cooper v. State, 432 P.2d 951 (Okla. Crim. App. 1967).

As recently as 1990 the Court of Criminal Appeals held that:

> It is a well established rule of law that the appropriate criminal penalty is the penalty in effect at the time the defendant commits the crime.

Bowman v. State, 789 P.2d 631 (Okla. Crim. App. 1990).

The decision in this case violates the holdings of all of the case discussed above, and should be reviewed by this Honorable Court.

III.

THE COURT OF CRIMINAL APPEALS BASED ITS DECISION ON AN ERRONEOUS APPLICATION OF A "DEATH IS DIFFERENT" STANDARD FOR CAPITAL CASES.

It is a well established rule of law that unless specified otherwise, statutes only have prospective, and not retroactive, application. See e.g. Edwards v. State,

591 P.2d 313, 317 (Okla. Crim. App. 1979); In re Bomgardner, 711 P.2d 92, 95 (Okl. 1985); In re McNeely, 734 P.2d 1294, 1296, n. 7 (Okla. 1987).

The life without parole amendment under § 701.10 did not specify that it was to have retroactive application. The primary reason that the Court of Criminal Appeals gave for treating § 701.10 differently is because it dealt with capital cases, citing this Court's decision in Caldwell v. Mississippi, 472 U.S. 320, 329, 105 S.Ct. 2633, 86 L.Ed.2d 231, 239 (1985). Salazar, 852 P.2d at 739; Hain, 852 P.2d at 753. As the dissent in both Hain and Salazar pointed out:

> While the final nature of the death penalty may result in a more microscopic review of the facts of a case, it does not change basic principle of the application of a rule of law, or the manner of consistently applying the law.

Hain, 852 P.2d at 755.

This Court has recognized that the states are bound by basic rules of law in capital cases. In Boyde v. California, 494 U.S. 370, 110 S.Ct. 1190, 108 L.Ed.2d 316 (1990), this Court articulated the standard for evaluating ambiguous jury instructions. In so doing, this Court stated:

> There is, of course, a strong policy in favor of accurate determination of the appropriate sentence in a capital case, but there is an equally strong policy against retrials years after the first trial where the claimed error amounts to no more than speculation.

This statements is indicative of this Court's policy that while the qualitative different of death from all other punishments requires a greater degree of scrutiny, it does not require that state procedural rules or constitutional provision be overlooked.

While procedural statutes may be retroactively applied, substantive statutes

may not. The Supreme Court of Kansas, in discussing whether a statute enlarging the jurisdiction of the juvenile courts applied to cases then pending on appeal, stated:

> As related to criminal law and procedure, **substantive law is that which declares what acts are crimes and prescribes the punishment therefor;** whereas, procedural law is that which provides or regulates the steps by which one who violates a criminal statute is punished. (22 C.J.S. § 1 a; 40 Words and Phrases, Substantive Law, p. 859).

State v. Augustine, 416 P.2d 281 (Kan. 1966) (emphasis added). Likewise, in an Arizona case, the court held that certain changes in that State's rules of evidence were procedural and not substantive, where:

> the crimes for which the defendant was charged, **the punishment to be imposed**, and the quantity of degree of proof necessary to convict remained the same; only the admissibility of certain evidence was changed.

State v. Steelman, 120 Ariz. 301, 585 P.2d 1213 (1978) (emphasis added).

Thus, the legislation in this case, in adding a middle, third tier to the possible punishment ranges for First Degree Murder,

constituted a change of substantive, and not procedural law. The change did not merely affect the method of enforcing the punishment, but the actual statutory punishment itself. Therefore, absent specific legislative intent, the amendment should not have been applied retroactively. Merely because the case deals with capital punishment does not allow disregard for well settled precedent. The Court of Criminal Appeals misapplied this Court's holding in Caldwell and its progeny by using the "death is different" standard to disregard established precedent. The result of that misapplication is an unconstitutional and contrived mechanism for re-sentencing in certain capital cases.

CONCLUSION

This Court should grant the Petition for Writ of Certiorari.

Respectfully submitted,

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Order Denying Petition for
Rehearing and Directing Issuance of
Mandate. 56

EXHIBIT "A"

SCOTT ALLEN HAIN,

Appellant,

v.

STATE OF OKLAHOMA,

Appellee.

No. F-88-466

Court of Criminal Appeals of Oklahoma

April 29, 1993

Rehearing Denied and Mandate Issued September 14, 1993.

Defendant was convicted in the District Court, Creek County, Donald D. Thompson, J., of capital murder, and was sentenced to death. On appeal, the Court of Criminal Appeals, Lane J., held that: (1) Oklahoma's system of capital punishment is facially constitutional; (2) where verdict did not specify whether defendant was found guilty of malice-aforethought murder or felony-murder, reviewing court would assume that verdict was for felony-murder, thereby precluding additional conviction for

robbery on double jeopardy grounds; (3) amendment to death penalty statute, adding potential punishment alternative of life without parole, was applicable to case tried after its effective date.

Convictions affirmed in part and reversed in part; sentence vacated and case remanded.

Lumpkin, P.J., concurred in part, dissented in part and filed opinion.

Johnson, V.P.J., concurred specially and filed opinion.

1. Criminal Law - 1208.1(4.1)

Oklahoma's system of capital punishment is facially constitutional. U.S.C.A. Const. Amends. 8, 14.

2. Infants - 68.2

Reverse certification procedure, used for determining whether 16 or 17-year-old defendant should be tried as adult, does not unconstitutionally fail to narrow class of offenders against which death penalty

may be sought; rather, procedure adds security of preliminary determination as to whether prosecution as adult is appropriate, death penalty concerns aside, before affording young defendant all constitutional protections against arbitrary assessment of death penalty afforded any other defendant. 10 Okl.St.Ann. § 1104.2.

3. Constitutional Law - 213.1(2)

In order to meet constitutional equal protection requirements, any system of classification must provide sufficient standards so as to establish rational basis for classification. U.S.C.A. Const.Amend. 14.

4. Infants - 69(1)

Imposition of death penalty upon murder defendant who was 17 years old at time of offense did not offend societal standards of decency; defendant was afforded protections of reverse certification

process, which determined that he should be treated as adult. 10 Okl.St.Ann. § 1104.2.

5. Jury - 131(13)

Murder defendant was not entitled to individual voir dire of jurors in order to assess effect of fairly substantial pretrial publicity; defendant did not claim that he was denied fair or impartial jury, and there was no indication that he was unable to ask any question of any potential juror.

6. Jury - 33(1.15, 1.20)

Capital murder defendant failed to establish that absence of any blacks and presence of very few young people in pool from which jury was selected deprived him of his right to jury from fair cross section of population; there was no evidence that underrepresentation of any group, assuming it existed, was due to systematic exclusion of group from jury process. U.S.C.A. Const. Amend. 6.

7. Criminal Law - 661

Evidentiary matters are largely left to discretion of trial court; appellate review focuses upon whether, in face of challenge to particular item of evidence or portion of testimony, trial court made appropriate decision.

8. Homicide - 179

Evidence obtained by psychiatrist in conducting pretrial competency evaluation of capital murder defendant was admissible as substantive evidence with regard to issue of defendant's sanity at time of offense, where evidence was offered in direct rebuttal to defendant's evidence that he was not sane at time of crime.

9. Criminal Law - 1120(9)

Murder defendant appealing admission of victim photographs did not establish appropriate appellate record; there was no request that pictures be made part of

record and they were not included for appellate court's review.

10. Criminal Law - 1036.1(3.1)

Unobjected-to testimony of murder victims' relatives was not fundamental error; while testimony as to identification of victims and their belongings may have been unnecessary in light of other testimony to same facts, at most it was merely cumulative.

11. Homicide - 312

Conviction for murder may be affirmed where alternative theories are charged and evidence supports either malice-aforethought or felony-murder; where alternative charges are based on factual basis of crime rather than actual nature of offense, jury is not required to indicate which alternative conviction is based upon.

12. Criminal law - 1144.16

Where verdict did not specify whether defendant was found guilty of malice-aforethought murder of felony-murder, reviewing court would assume that verdict was for felony-murder, thereby precluding additional conviction for robbery on double jeopardy grounds. U.S.C.A. Const.Amend. 5.

13. Criminal Law - 1206.3(2)

Amendment to death penalty statute, adding potential punishment alternative of life without parole, was applicable to case tried after its effective date, even though crime was committed before effective date. 21 Okl.St.Ann. § 701.10.

An Appeal from the District Court of Creek County, Donald D. Thompson, District Judge.

SCOTT ALLEN HAIN, Appellant, was convicted of two counts each of Murder in

the First Degree, Kidnapping, Robbery with Firearms, and Larceny of an Automobile and one count of Arson in the Third Degree after a two stage jury trial in the District Court of Creek County, Case No. CRF-87-240. Following the guilty verdicts, Appellant was sentenced in accordance with the jury's recommendations. He received the death penalty on each count of Murder, ten years per count for Kidnapping, one hundred years per count for Robbery with Firearms, twenty years per count for Larceny of an Automobile and fifteen years for the third degree Arson. Appellant has brought this appeal challenging both the guilty verdicts and the sentences imposed for the crimes. Having reviewed the allegations of error raised by Appellant, we find that the convictions for Murder, Kidnapping, Arson in the Third Degree and Larceny of an Automobile are AFFIRMED. The convictions for Robbery with Firearms are

REVERSED with instructions to DISMISS. The death sentence returned for the Murder convictions is VACATED and the case is REMANDED for new second stage proceedings.

John Thomas Hall and Elaine Meek, Tulsa, for appellant.

Robert H. Henry, Atty. Gen., Carol Price Dillingham, Asst. Atty. Gen., Oklahoma City, for appellee.

OPINION

LANE, Judge:

Appellant, Scott Allen Hain, was convicted of two counts each of Murder in the First Degree, Kidnapping, Robbery with Firearms, and Larceny of an Automobile and one count of Arson in the Third Degree after a two stage jury trial in the District Court of Creek County, Case No. CRF-87-240. Following the guilty verdicts, Appellant was sentenced in accordance with the jury's recommendations. He received the death penalty on each count of Murder,

ten years per count for Kidnapping, one hundred years per count for Robbery with Firearms, twenty years per count for Larceny of an Automobile and fifteen years for the third degree Arson. Appellant has brought this appeal challenging both the guilty verdicts and the sentences imposed for the crimes.

During the early morning hours of October 6, 1987, Laura Lee Sanders and Michael Houghton were seated in Sanders' car outside a Tulsa bar when they were approached by two men, later determined to be Scott Allen Hain and Robert Wayne Lambert. Hain and Lambert were in the parking lot, waiting to rob a nearby house when they saw Sanders and Houghton talking in the car. Appellant and Lambert forced their way into the car by threatening Houghton with a knife.

Hain drove the car away from the bar, then stopped and robbed Houghton at

gunpoint. When Houghton resisted the robbery, Appellant forced him into the trunk of the car. A short while later, Appellant and Lambert stopped and put Sanders in the trunk as well.

After robbing Houghton and getting the keys to his truck, the two men decided to go back to the bar where the incident began and take Houghton's truck as well as Sanders car. Lambert drove the truck away from Tulsa towards Sand Springs. He stopped after driving down a rural Creek County roadway. Appellant followed in Sanders' car with Sanders and Houghton in the trunk.

The two men took Sanders' things, including some clothes, out of her car and put them in the truck. One of them cut the gas line to the car and set it on fire by putting lighted newspaper and a blanket under the dripping fuel line. Houghton and Sanders were banging on the trunk and

yelling. Appellant and Lambert left the area, however, returned a short time later to see if the fire was burning well.

The two men stopped at a friend's house in Jennings and left a bag of things belonging to the victims in the garage. They traveled to Wichita, Kansas in Houghton's truck. After spending the five hundred and sixty-five ($565.00) dollars which they got from Houghton and Sanders, the two returned to Tulsa, where they were apprehended on the evening of October 9, 1987.

STATUS AS A JUVENILE

Appellant's first series of arguments concerns the fact that he was seventeen when the murders of Houghton and Sanders were committed. He complains that the reverse certification procedures in Oklahoma do not sufficiently narrow the class of offenders against which the death penalty may be sought; that execution of a

juvenile is against societal standards of decency; that the punishment "fails in the 'proportionality' analysis;" and that the classification standards are arbitrary and capricious. We disagree with Appellant's assessment of the statutes concerning the certification process and how they relate to the imposition of punishment in this case or any other case involving the death penalty.

As his first allegation of error, Appellant asserts that the imposition of the death penalty against a juvenile is prohibited by both the Eighth and Fourteenth Amendments to the United States Constitution. Specifically he claims that Oklahoma's reverse certification procedure, which provides that a sixteen or seventeen year old is considered to be an adult when he commits certain crimes, does not meet the standard for "death qualification" set by Gregg v. Georgia, 428 U.S. 153, 96 S.Ct.

2909, 49 L.Ed.2d 859 (1976). Appellant misrepresents the purpose of the reverse certification process when he attempts to apply the principals of Gregg solely to the pre-trial reverse certification stage of criminal proceedings.

In Gregg, the Supreme Court analyzed the Georgia system of capital punishment to determine whether the problems confronted in Furman v. Georgia, 408 U.S. 238, 92 S.Ct. 2726, 33 L.Ed.2d 346 (1972), had been resolved. In Furman, "the Court held that the penalty of death may not be imposed under sentencing procedures that create a substantial risk that the punishment will be inflicted in an arbitrary and capricious manner." Godfrey v. Georgia, 446 U.S. 420, 426, 100 S.Ct. 1759, 1764, 64 L.Ed.2d 398 (1980). In Gregg, the Court held:

> Furman held only that in order to minimize the risk that the death penalty would be imposed on a capriciously selected group of offenders, the

> decision to impose it had to be guided by standards so that the sentencing authority would focus on the particularized circumstances of the crime and the defendant. (Emphasis added).

Id. 428 U.S. at 199, 96 S.Ct. at 2937.

We most recently considered these dictates in Allen v. State, 821 P.2d 371 (Okl.Cr.1991), where we held:

> It has long been recognized that a system of capital punishment must meet strict constitutional requirements to be upheld. The primary goal of any such system must be the allowance of individualized sentencing tempered by a controlled amount of discretion, exercisable by the trier of fact.

[1] Oklahoma's system of capital punishment meets the qualifications established by the Supreme Court and on its face is constitutional. Certainly this fact is evidenced by the multitude of Oklahoma cases which have been affirmed by the United States Supreme Court. See

Saffle v. Parks, 494 U.S. 484, 110 S.Ct. 1257, 108 L.Ed.2d 415 (1990). The comprehensive statutory sections concerning death penalty proceedings, coupled with proper instructions to the jury in the punishment stage of trial, guarantee that the death penalty will only be assessed against that class of criminals whose crimes set them apart from "any other murder." Zant v. Stephens, 462 U.S. 862, 878, 103 S.Ct. 2733, 2743, 77 L.Ed.2d 235, 251 (1983).

[2] Appellant has focused on the reverse certification process and attempted to bootstrap the requirement of narrowing qualifications into this preliminary, pre-trial stage of the prosecution. Defining the class of offenders potentially eligible for the death penalty is not a function of 10 O.S.Supp. 1986, § 1104.2. That section merely determines whether an alleged offender, either sixteen or seventeen years

old, may be prosecuted as an adult or whether he should be treated as a juvenile. To the extent that classification as a juvenile is denied, as it was here, then the admittedly young defendant is afforded all the constitutional protections against the arbitrary assessment of the death penalty as is any other defendant.

We find that the statutory processes carried out in the present case afforded Appellant double protection against the unfair assessment of the death penalty. Appellant had the added security of a preliminary determination as to whether prosecution as an adult was appropriate, death penalty concerns aside. If anything, the reverse certification process adds an additional measure of certainty to the entire criminal process.

[3] In connection with Section 1104.2, Appellant also argues that in general, the standards by which reverse certification is

measured are arbitrary and capricious. Appellant correctly argues that in order to meet constitutional standards, any system of classification must provide sufficient standards so as to establish a rational basis for the classification. His argument here, however, fails due to his inability to point out any portion of the process or statutory language which offends any of the constitutional protections. We have consistently held that the standards set out by the statute are appropriate and protect the constitutional guarantees of the individual offender. A.M.H. v. State, 766 P.2d 351 (Okl.Cr.1988); G.E.D. v. State, 751 P.2d 755 (Okl.Cr.1988); Trolinger v. State, 736 P.2d 168 (Okl.Cr.1987).

[4] Appellant's next two arguments with regard to the effect of his age concern the actual assessment of the death penalty. He argues that the execution of

murderers who were under the age of eighteen at the time the crime was committed offends the standards of society and that his sentence fails the proportionality standards established by Enmund v. Florida, 458 U.S. 782, 102 S.Ct. 3368, 73 L.Ed.2d 1140 (1982). We disagree. Both of Appellant's arguments are based on his assertion that "adolescents or children are less blameworthy than adults" and apparently should not be held accountable for their actions. We dispensed with a similar argument in Sellers v. State, 809 P.2d 676 (Okl.Cr.1991). In that case we considered the imposition of the death penalty in cases involving defendants who were sixteen years old at the time of their crimes. We recognized that although a plurality of the Supreme Court has held that execution of a person who was under sixteen at the time of the offenses would violate the Eighth Amendment, the Court

expressed no opinion concerning seventeen year old criminals. Thompson v. Oklahoma, 487 U.S. 815, 108 S.Ct. 2687, 101 L.Ed.2d 702 (1988).

In Sellers, we rejected the argument the Thompson decision should be extended to persons between the ages of sixteen and eighteen. We held:

> We are unpersuaded that our previous decisions should be disturbed with respect to a person who was sixteen at the time of his offense. In her concurring opinion [in Thompson], Justice O'Connor expressed the belief that a national consensus exists which forbids the execution of any person for crimes committed before the age of sixteen. In the absence of a clear expression by the State Legislature, she found the use of capital punishment to be unauthorized. By excluding persons sixteen years of age who commit murder from the statutory definition of "child", see 10 O.S.Supp.1987, § 1101(1), we find that the Legislature clearly expressed its intention that such persons should be subject to the full range of punishments prescribed for adult offenders.

Appellant offers no effective reason why we should reconsider our previous position. Appellant was afforded the protections of the reverse certification process, including separate appellate review of the trial court's decision prior to his adult criminal prosecution.[1] We believe that the societal interests and standards of decency are properly protected by such a system which independently measures whether or not the individual offender should be treated as a child or as an adult. To the extent the factors involved indicate that treatment as an adult, with its incumbent levels of punishment, is warranted, then

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[1]Appellant challenges the finding by the trial court that he should be prosecuted as an adult by arguing that the court's finding was against the weight of the evidence. This argument was not raised on the direct appeal of the order denying certification. See S.A.H. v. State, 753 P.2d 381 (Okl.Cr.1988). Accordingly, further consideration at this time is barred by principals of res judicata.

standards of decency and proper morality are maintained. We see no reason to find that Appellant's case is outside the scope of expected result of the various procedures employed.

FIRST STAGE PROCEEDINGS

Next we turn to the allegations of error which Appellant suggest occurred during the first stage of the trial.[2] Appellant asserts that errors occurred in the jury selection process, that he was subjected to double jeopardy, that the jury was improperly instructed and that the trial court committed several errors with regard to the admission of evidence. We will consider these arguments in the order they occurred at the trial.

In propositions thirteen and eighteen of his brief, Appellant claims that he was

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[2]These include propositions III, IV, V, X, XII, XIV, XVII and XVIII.

deprived of a fair jury because he was not allowed to privately individually voir dire the members of the panel concerning the pretrial publicity to which they had been exposed and because there were no blacks included in the pool from which the jury was selected. We do not find that either of these allegations justify relief.

[5] As his first claim with respect to the voir dire proceedings at his trial, Appellant claims that the trial court erred when it refused to allow individual questioning of each individual called in order to assess the effect of fairly substantial pretrial publicity. We considered an identical issue in Vowell v. State, 728 P.2d 854, 857-58 (Okl.Cr.1986), wherein we held:

> Appellant requested individual voir dire of jurors, as well as sequestration of them during voir dire. Appellant did not have a right to either request, though such may be allowed by the trial court . . . .

> The existence of extensive pretrial new coverage does not itself demand individual or sequestered voir dire . . . . The crux of the issue is whether [a] defendant can receive fair and impartial jurors . . . . An exhaustive voir dire was conducted accounting for nearly seven hundred pages of transcript, and as previously noted, an apparently impartial jury was selected.

We find no reason to reach a different conclusion in this case. Appellant does not claim that he was denied a fair or impartial jury. There is no indication that he was unable to ask any question of any potential juror. Accordingly, we must conclude that the very thorough voir dire proceedings undertaken in this case resulted in the fair and impartial jury to which Appellant is entitled.

[6] The next indictment of the jury selection process concerns the fact that there were no blacks called to serve in the pool from which jury selection in this case

was made. Appellant also points out that there were very few young people in the pool. The crux of his argument is not that he did not receive a fair and impartial jury, but that the jury selection pool did not constitute a random cross section of the population. This issue has previously been the subject of several opinions from this Court.

In Moore v. State, 736 P.2d 161, 165 (Okl.Cr.1987), **cert. denied** 484 U.S. 873, 108 S.Ct. 212 98 L.Ed2d 163 (1987), we discussed and adopted the criteria which must be proven by a defendant in order to sustain a claim of this nature. We quoted the three proof requirements established by the Supreme Court in Duren v. Missouri, 439 U.S. 357, 364, 99 S.Ct. 664, 668, 58 L.Ed.2d 579, 587 (1979) as being:

> (1) that the group alleged to be excluded is a 'distinctive' group in the community;

(2) that the representation of this group in venires from which juries are selected is not fair and reasonable in relation to the number of such persons in the community; and (3) that this under representation is due to the systematic exclusion of the group in the jury process.

See also Fox v. State, 779 P.2d 562 (Okl.Cr.1989), **cert. denied** 494 U.S. 1060, 110 S.Ct. 1538, 108 L.Ed.2d 777 (1990); Litteer v. State, 783 P.2d 971 (Okl.Cr.1989).

Appellant's claim may be rejected on two grounds. First, there is not an appropriate record from which we may determine the veracity of his claim and second, because he has failed to provide any evidence that the under representation of any group, assuming one does exist, was "due to the systematic exclusion of the group in the jury process."

Following the resolution of the jury selection process, counsel for Appellant made the following objection:

I object to the racial exposition (sic) of the entire panel, now that we have seen them and seen each individual taking a seat. I would state to the Court, it is not racially balanced from the standpoint of my-nor was it greatly balanced from the beginning. And, as such, Your Honor, I would ask for a mistrial and another panel be selected that are more racially balanced.

Tr. 222.

This argument by counsel is the only objection voiced to the composition of the jury. It appears from the context of counsel's argument that he is objecting only to the racial mix of the jurors actually chosen. In any event, there is no record before us which indicates the race or the individual ages of those comprising

either the original pool or the jury selected. This absence alone is sufficient ground on which to deny the allegation. We cannot assume error from a silent record. Carter v. State, 595 P.2d 1352 (Okl.Cr.1979); Reid v. State 478 P.2d 988 (Okl.Cr.1970). See also Ellis v. State 795 P.2d 107, 109 (Okl.Cr.1990); Hill v. State, 745 P.2d 107, 109 (Okl.Cr.1987); Cardenas v. State, 695 P.2d 876, 878 (Okl.Cr.1985); Dollar v. State, 674 P.2d 48, 50 (Okl.Cr.1984)

Regardless of the silent record, we find that Appellant has wholly failed to satisfy the burden of proof assigned to him by Duren. There is no question but that blacks are a distinctive group in any community; likewise young adults. Accordingly the first factor of the Duren criteria is undeniably established. The same is not true, however, of the second and third prongs of the test.

There is no evidence in the record of the proportion of blacks or young adults which live in Creek County. Neither is there even a hint of confirmation that the assumed (but not proven) absence of these two classes from the jury or the jury selection pool was due to their "systematic exclusion" by the selection process itself. Appellant has not met the minimum level of proof required to justify further evaluation of his claim. In the absence of such proof, we find no error or reason to believe that the jury as selected was anything other than fair and impartial.

In propositions III, XIV and XVII, Appellant raises issues dealing with the admission of evidence during the trial. Specifically, Appellant claims that the state's psychiatrist was improperly allowed to testify concerning statements which were made in violation of his constitutional rights and that certain evidence, the

pictures of the bodies and the testimony of the victims relatives, was more prejudicial than probative and should have been excluded.

[7] At the outset, we recognize that evidentiary matters are largely left to the discretion of the trial court. Rosteck v. State, 749 P.2d 556 (Okl.Cr.1988). Accordingly, our review must focus upon whether, in the face of challenge to the particular item of evidence or portion of testimony, the trial court made the appropriate decision.

[8] Appellant's first allegation with regard to the admissibility of evidence concerns the testimony of Dr. Thomas Goodman, a psychiatrist called by the state during rebuttal in the first stage of the trial. Dr. Goodman examined Appellant at Eastern State Hospital in connection with the pretrial competency evaluation requested by the State. Appellant now

argues that Dr. Goodman's subsequent testimony involving opinions derived from the pretrial examination should not have been allowed as substantive with regard to Appellant's sanity at the time of the offense.

Unlike the cases which Appellant cites, there is no allegation that the testimony by Dr. Goodman was allowed in violation of the Fifth Amendment. In Estelle v. Smith, 451 U.S.454, 101 S.Ct. 1866, 68 L.Ed.2d 359 (1981); Stinson v. State, 528 P.2d 735 (Okl.Cr.1974); Noyes v. State, 516 P.2d 1368 (Okl.Cr.1973), the question at issue involved the admission of the psychiatric testimony as substantive evidence of guilt. In those cases, where the opinion rendered involves a confession of the details of the crime to the medical professional, there is no question that any and all legal means must be taken to protect the defendant's

rights against self incrimination. The situation in this case is different.

We are not concerned with testimony upon which a jury finding of future dangerousness is based as was true in Estelle. Instead, the evidence was offered in direct rebuttal to Appellant's evidence that he was not sane at the time of the crime. We find our resolution of this issue is guided by the Supreme Court's decision in Buchanan v. Kentucky, 483 U.S. 402, 107 S.Ct. 2906, 97 L.Ed.2d 336 (1987).

In Buchanan, the Court held that the dictates of Estelle with regard to the introduction of opinions based on information gleaned during a competency evaluation are applicable only in those cases where the mental condition is not put into issue by the accused. This case is distinctly different in that Appellant's mental status was an issue raised directly by Appellant. In fact, as was the case in

Buchanan, the evidence as to Appellant's mental status was the only evidence presented by the defense.

Appellant filed an "Application and Notice for the Use of the Insanity Defense" on February 2, 1988. (O.R. 200). On February 10, the trial court granted Appellant's request for the appointment of psychiatric expert. (O.R. 215). In May, the State received the court's permission to require Appellant to submit to examination with respect to his insanity defense. The testimony at issue was generated at this examination.

In Buchanan, the Court recognized the inherent difficulty of applying the restrictive rules of Estelle, in a situation where the defendant relies on psychiatric testimony, yet seeks to prohibit the State from obtaining or using rebutting evidence. The Court noted that "[i]n such circumstances, the [State] could

not respond to this defense unless it presented other psychological evidence." Buchanan 483 U.S. at 423, 107 S.Ct. at 2918.

As was true in Buchanan, the testimony in this case was admitted solely for the purpose of rebutting Appellant's evidence of extreme emotional disturbance. Dr. Goodman did not testify about any of the criminal acts giving rise to the action against Appellant. From the record, it appears that Appellant was apparently advised of his rights in this regard and declined to discuss the details of the crime with the doctor. A violation of the Fifth Amendment may only arise when the testimony involved is based on the incriminating statements of the defendant. There is no evidence of that here, thus, there is no reason for the exclusion of the evidence.

[9] In Proposition XIV and XVII, Appellant identifies evidence, photographs of the victims and testimony by their relatives, which he claims should not have been offered at trial in that it was more prejudicial than probative. At the outset, we note that Appellant has not established the appropriate record to allow the review of the photographs. There was no request that the pictures be made a part of the record and they were not included for our review. Accordingly, we cannot comment on the effect which the pictures may have had at the trial. Ellis v. State, 795 P.2d 107, 109 (Okl.Cr.1990); Hill v. State, 745 P.2d 410, 411 (Okl.Cr.1987); Cardenas v. State, 695 P.2d 876, 878 (Okl.Cr.1985); Dollar v. State, 674 P.2d 48, 50 (Okl.Cr.1984).

[10] The second evidentiary matter addressed by Appellant concerns testimony by Houghton's wife and Sanders' mother.

Appellant claims that the testimony was put on purely for the purpose of creating sympathy for the victims. Appellant did not object to the testimony at trial, thus he has waived all but fundamental error. Jones v. State, 772 P.2d 922 (Okl.Cr.1989); Grant v. State, 764 P.2d 214 (Okl.Cr.1988).

While we find that the testimony of the relatives as to the identification of the victims and their belongings may have been unnecessary in light of other testimony to the same facts, at most it was merely cumulative. We do not find that fundamental error has occurred.

The final allegations with respect to the first stage of the proceedings concern the manner in which the questions of guilt were submitted to the jury. In Proposition X, Appellant claims that error occurred when the jury was not required to specify whether the guilty verdict was based on malice aforethought murder or felony

murder. In connection, he also claims in Proposition V, that the possibility that he was convicted based on Felony murder makes his convictions for kidnapping and robbery a violation of the constitutional protections against double jeopardy.

[11] This Court has long held that a conviction for murder may be affirmed where alternative theories are charged when the evidence supports either malice aforethought or felony murder. In James v. State, 637 P.2d 862, 865-66 (Okl.Cr.1981), we held that when the alternative charges were based on the factual basis of the crime, rather than the actual nature of the offense, a jury was not required to indicate which of the alternatives upon which the conviction was based. See also Newsted v. State, 720 P.2d 734, 737 (Okl.Cr.1986); Plunkett v. State, 719 P.2d 834 841 (Okl.Cr. 1986); Phillips v. State, 641 P.2d 556, 559 (Okl.Cr. 1982). See also

Schad v. Arizona, 501 U.S. ____, 111 S.Ct. 2491, 115 L.Ed.2d 555 (1991). The verdict was proper, thus there is no error with regard to the murder conviction.

[12] We must, however, reach a different conclusion with respect to the allegation that conviction for the offense of robbery constitutes double jeopardy. In Munson v. State, 758 P.2d 324, 332 (Okl.Cr.1988), we considered the same allegation on almost identical facts. In that case we held:

> Nonetheless, because the jury's verdict does not specify whether appellant was found guilty of malice-aforethought murder or kidnapping murder or armed-robbery murder, the verdict must be interpreted as one of felony murder in order that appellant received the benefit of the rule that a defendant cannot be convicted of felony-murder and the underlying felony.... To determine which felony formed the basis for felony-murder where more than one underlying felony is charged, one must look first to the information

and second to the evidence. (Citations omitted).

In Munson, we determined that the armed robbery conviction must be dismissed in that the robbery was "the initial felony which began the chain of events leading to the victim's death." Id. at 333. We reversed the conviction and ordered its dismissal. We find the same result to be warranted here. The evidence at trial indicates that the events in this case which lead to the deaths of the victims arose from Appellant's desire to commit armed robbery. He robbed the victims and then decided to steal their cars. Accordingly, we find that Appellant's conviction for two counts of Robbery with Firearms must be reversed and remanded with instructions to dismiss them.

SECOND STAGE PROCEEDINGS

[13] We need only address one of the allegations made concerning errors

occurring in the second stage of the proceedings because that error requires that the case be remanded back to the trial court for resentencing. Appellant alleges that his rights to due process and equal protection were violated when the trial court failed to instruct the jury with respect to the potential punishment alternative, life without parole. He bases his claim on the fact that this punishment option, codified at 21 O.S. 1981, § 701.10, became law prior to his trial, although subsequent to the commission of the offenses. We find merit in the argument.

Due to the extreme nature of the penalty involved in capital murder cases, we have often discussed the need for extremely careful scrutiny of the imposition of the death sentence. See Liles v. State, 702 P.2d 1025, 1036 (Okl.Cr.1985). This philosophy is also demonstrated by the legislative requirement that this Court

examine each and every sentence of death for the evidence that the sentence was imposed under the influence of passion, prejudice or any other arbitrary factor, and whether the evidence offered at trial supports each of the jury's findings with respect to the aggravating circumstances which support the sentence. 21 O.S.Supp.1987, § 701.13(C). In short, sentences of death must absolutely, unquestionably fair.

Given the gravity of the death penalty, we find that principals of fundamental fairness compel us to reverse this case for a new second stage trial. As discussed in Allen v. State, 821 P.2d 371 (Okl.Cr.1991), we find no constitutional prohibition to the application of this possible sentencing option in cases where the penalty became law in the period while the offender awaited trial. Quite simply, we cannot justify a decision which would act as a

total bar to consideration of a punishment alternative to death merely because the crime giving rise to the trial occurred a short time before the effective date of previously enacted legislation.

The circumstances involved in this decision are unique and should not be interpreted to have any broader ramifications outside the very limited situation implicated under these facts. We will apply this analysis only in cases where the amendment adding the option of life without parole to Section 701.10 was in effect at the time of the trial. Only those cases will receive consideration of the additional sentencing possibility. In the interests of fundamental fairness, we find that justice demands the action taken by this Court under these distinctively compelling facts.

Having reviewed the allegations of error raised by Appellant, we find that the

convictions for Murder, Kidnapping, Arson in the Third Degree and Larceny of an Automobile are **AFFIRMED**. The convictions for Robbery with Firearms are **REVERSED** with instructions to **DISMISS**. The death sentence returned for the Murder convictions is **VACATED** and the case is **REMANDED** for new second stage proceedings.

LUMPKIN, P.J., concurs in part/dissents in part.

JOHNSON, V.P.J., specially concurs.

CHAPEL, J., concurs.

LUMPKIN, Presiding Judge: concurring in part/dissenting in part.

I concur in this Court's determination the convictions for murder, kidnapping, arson and larceny of an automobile should be affirmed; and the convictions for robbery with firearms should be reversed. I dissent to the Court's determination the case should be remanded for resentencing, using the life-without-parole option.

This Court in its holding cites "principals [sic] of fundamental fairness" in reversing for a new second-stage trial. Ante at 753. This puts me in a quandary, for how does one dissent to principles of fundamental fairness? This quandary, however, shows precisely why use of this equitable principle cannot serve as the basis for a ruling of law. As was said over a century ago:

> Equity is a Roguish thing: for Law we have a measure, know what to trust to, Equity is according to the Conscience of him that a Chancellor, and as that is larger or narrower, so is Equity. 'Tis all one as if they should make the Standard for the measure, we call, a Chancellor's Foot, what an uncertain measure would this be? One Chancellor has a long Foot, another a short Foot, a third an indifferent Foot. 'Tis the same thing in Chancellor's Conscience.

Seldon, John, Equity Table-Talk (Arber, Edward, ed. in English Reprints, nos. 1-7, London: 1869) at 46. What is "fundamental

fairness" to one judge may not be "fundamental fairness" to another.

"*Fairness*" in the law as applied in the Due Process Clause of the Fourteenth Amendment to the Constitution of the United States, demands, among other things, fair notice of the nature of the prohibitive acts. Capler v. City of Greenville, Miss., 298 F.Supp. 295, 298 (N.D.Miss.1969), aff'd, 422 F.2d 299 (5th Cir.1970). Here, Appellant received that "fairness": he knew the punishment for first degree murder at the time he committed it was either life in prison or death.

The majority cites Allen v. State, 821 P.2d 371 (Okl.Cr.1991) for the proposition there is no constitutional infirmity in the application of the life-without-parole option to a murder which occurred before that punishment option went into effect. Allen is discussed more fully below. But first, I will show jurisprudence covering

nearly nine decades proves the majority of this Court is simply wrong, both here and in its previous analysis.

Our most recent decision dealt with the subject of retroactive application of punishment is Bowman v. State, 789 P.2d 631 (Okl.Cr.1990). In Bowman, we stated with clarity that "the appropriate criminal penalty is the penalty in effect at the time the defendant commits the crime." Id. at 631 (citing Penn v. State, 13 Okl.Cr.367, 164 P. 992 (1917) and Alberty v. State, 10 Okl.Cr. 616, 140 P. 1025 (1914)). Federal courts repeatedly apply this basic principle of law. In United States v. Towne, 870 F.2d 880 (2d Cir.1989), cert. denied, 490 U.S. 1101, 109 S.Ct. 2456, 104 L.Ed.2d 1010 (1989), the Second Circuit found that the repeal of a statute prior to the defendant's being sentenced was inapposite because the statute was in effect at the time the

underlying offenses were committed and at the time the defendant was convicted. Id. at 887. See also Burge v. Butler, 867 F.2d 247, 250 (5th Cir.1989).

In addition, a review of our jurisprudence reveals this principle was part of the legal foundation laid at statehood. One of the first cases was Sharp v. State, 3 Okl.Cr. 24, 104 P.71 (1909). The defendant there committed an offense while Indian Territory was governed by the laws of the state of Arkansas. The defendant did not go to trial until after Oklahoma had become a state and enacted its statutes. The question before the Court was whether the laws of Arkansas or Oklahoma should be applied. The Court determined that application of the laws of the state of Oklahoma would seriously harm the defendant and the only choice was to use the laws which controlled at the time of the offense. Relying on a United States

Supreme Court case, Kring v. Missouri, 107 U.S. 221, 2 S.Ct. 443, 27 L.Ed 506 (1883), the Oklahoma Court stated: "[t]he accused should be tried and dealt with under the law as it existed at the time of the commission of the crime of which he stands charged." Sharp, 3 Okl.Cr. at 31, 104 P. at 74. The Court reiterated this principle in Bowman when it determined that the sentence of ten years to life was proper because "[i]t is a well established rule of law that the appropriate criminal penalty is the penalty in effect at the time the defendant commits the crime." Bowman, 789 P.2d at 631. See also Freshour v. Turner, 496 P.2d 389, 392 (Okl.Cr.1972)(defendant, seventeen at the time of offense, not entitled to benefit of a subsequently enacted bill which defined the term "child" as any person under the age of eighteen; because language in the enactment did not show it was to be applied retroactively,

the law may be applied prospectively only); Jones v. State, 3 Okl.Cr. 593, 107 P. 738 (1910). The irony of the Court's attempt to apply "fairness" in this case is revealed by our decision in Costa v. State, 753 P.2d 393 (Okl.Cr.1986). In that case, the trial judge sentenced the defendant to life without parole, which was not a sentencing option at the time of the crime. Finding that the trial judge committed error with sentencing, this Court did not remand for sentencing, but struck the "without parole" portion of the sentence and remanded for the trial court to correct the error. Id. at 395.

Legal nuances of this type lead to an anomaly of the law. The anomaly then skews the principles of law which are to be applied and creates serious cracks in the foundation of our jurisprudence. In addition, it denigrates the principle that this is a nation of laws, and not of men.

This Court, in its analysis, alludes to the observation that "death is different". While the final nature of the death penalty may result in a more microscopic review of the facts of a case, it does not change basic principles of the application of a rule of law, or the manner of consistently applying the law. The basis of the United States Supreme Court's overturning the application of the death penalty in Furman v. Georgia, 408 U.S. 238, 92 S.Ct. 2726, 33 L.Ed.2d 346 (1972), was there must be a consistent application of the law, and that the vague, arbitrary applications of the penalty be removed. That concept of consistency in the application of legal principles must be applied fairly to all aspects of the review in a criminal case, whether it applies to the State or a defendant. For the Court to do otherwise creates aberrations in the law which impede

the orderly, consistent application of the law in the trial courts of this State.

The actions of the Court in this case, pursuant to some type of "fairness" review, disregard the facts of the case. The Appellant neither objected to the instructions given nor requested an instruction on this optional punishment. This Court should never take the position of trying to reinvent the trial strategy of an appellant's attorney in a trial. Trial judges are vested with a dual role of being fair and applying the law under the appropriate circumstance. The role of an appellate judge is to apply the law consistently and to ensure the rules of law are set forth to enable trial practitioners and trial judges to rely on those principles of law in the trial of cases. While procedural aspects may be declared to be applicable retroactively, pursuant to 22 O.S.1991, § 3, substantive amendments of

the penal statute cannot. The procedure for conducting a resentencing proceeding is substantially different than an application of the penal provision of the statutes based on when the crime was committed. The Court's analysis of a substantive provision skews the rules which apply to the retroactive effect of procedural matters.

It is in this vein that Allen v. State, 821 P.2d 371 (Okl.Cr.1991) was incorrectly decided. For whatever reason, this Court allowed itself to get sidetracked on an *ex post facto* question. Every second-year law student knows, when dealing with an ex post facto application, we by definition of the term necessarily assume that the statute in question is intended to be applied retroactively. I fear the Court has confused two entirely different principles of law. The question here, and the core of this dissent, is not whether it is *constitutionally permissible* to apply a law

retroactively, but whether the law was meant to be applied retroactively at all.

This above discussion and *stare decisis* clearly show that assumption makes Allen intellectually infirm. But even if this Court decides to throw out the combined jurisprudence of this Court since Statehood on the issue, it cannot overlook its own ruling in Wade v. State, 825 P.2d 1357, 1363 (Okl.Cr.1992), which held the option of life without parole would not be available if it were not requested by the defendant at trial. Here, the option was not requested; yet this Court would reverse the sentence despite its own more recent case.

Before Allen the law was clear: the punishment to be applied was the one in effect at the time the crime was committed. Allen created confusion where before there was none. Wade nurtured that confusion. But through the fog, a trial court could at

least count on one thing; if the option were requested, it would be given; if not, it would not be error on appeal. Now this Court seeks to throw out even that murky pronouncement. Confusion and inconsistency make poor bedfellows--especially in a capital murder case, which will be litigated for years to come.

"Principles of fundamental fairness" is an easy solution to the problem this Court has created by ignoring its own caselaw in determining "death is different." And as with many easy solutions, it is neat, plausible--and wrong. I cannot agree the doctrines of this Court are to be changed with every succeeding judge, and cannot join in an opinion that in some vague rush to "fairness" varies the law to be applied in such a manner that it is no more consistent than a Chancellor's foot.

I respectfully dissent.

JOHNSON, VICE PRESIDING JUDGE, SPECIALLY CONCURRING.

I Concur specially with the majority herein. See my Special Concurrance in Salazar v. State of Oklahoma, 852 P.2d 729.

ORDER DENYING PETITION FOR REHEARING AND DIRECTING ISSUANCE OF MANDATE

NOW on this 14th day of September, 1993, having examined the Petition for Rehearing in the above styled and numbered cause, and being fully advised in the premises, this Court finds that it should be, and the same hereby is DENIED. The reasons raised by the State as justification for the present petition were addressed in detail in Salazar v. State, 852 P.2d 729 (Okl.Cr.1993). The Clerk of the Court is directed to issue the mandate forthwith.

IT IS SO ORDERED.

GARY L. LUMPKIN, PRESIDING JUDGE

CHARLES A. JOHNSON, VICE PRESIDING JUDGE

JAMES F. LANE, JUDGE

CHARLES S. CHAPEL, JUDGE

RETA M. STRUBHAR, JUDGE

ORIGINAL

Supreme Court, U.S.
FILED
MAR 14 1994
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No. 93-1252

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1993

THE STATE OF OKLAHOMA

Petitioner,

vs.

SCOTT ALLEN HAIN

Respondent.

RESPONSE TO THE PETITIONER'S PETITION FOR WRIT OF CERTIORARI

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March 14, 1994

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RESPONSE TO PETITION FOR WRIT OF CERTIORARI

Respondent, Scott Allen Hain, by and through his attorney, John Thomas Hall, requests that the United States Supreme Court deny the Writ of Certiorari to hear the issues raised in said Petition for and because there are no federal grounds and the decision on which the issue of retroactivity of the giving of the life without parole sentencing option in first degree murder cases in Oklahoma was decided on adequate and independent State grounds. The Respondent has submitted other arguments in this matter on the same opinion below in U.S. Supreme Court Case No. 93-7066.

OPINION BELOW

The opinion of the Oklahoma Court of Criminal Appeals below which is the subject of this Writ is Hain v. State, 852 P.2d 744 (Okla. Cr. App. 1993). The opinion is attached as the Appendix in Case No. 93-7066, supra.

JURISDICTION

The Respondent denies that the Court has jurisdiction pursuant to 28 U.S.C. § 1257 (a) because there is no equal protection issue and the issue complained of by Petitioner was decided on adequate and independent State grounds.

STATEMENT OF THE CASE

The Respondent would adopt his Statement of the Case in Case No. 93-7066, and would state that there is no material disagreement with Petitioner in its Statement of the Case.

SUMMARY OF THE ARGUMENT

The Petitioner argues that the decision of the Court below is a violation of Equal Protection. The Respondent would argue that Equal Protection applies to an individual, not a group. This by simple logic would demand that any group which would come under the aegis of Equal Protection would have to have at least one individual in it. As the State freely admits, there are no persons in this class. Further, Equal Protection is not available to the State. Hence, Equal Protection does not apply and the Writ should be denied. Mitchell v. United States, 313 U.S. 80, 85 L.Ed.2nd 1201, 61 S.Ct. 873 (1941); Pennsylvania v. New Jersey, 426 U.S. 660, 49 L.Ed.2nd 124, 96 S.Ct. 2333(1976); Oklahoma v. Ballard, S-91-769, 65 OBAJ 560 (February 12, 1994).

Further, the next two arguments of the Petitioner deal with no recognizable federal issue. Moreover, if there is any federal issue, such as the construction of "death is different", the decision by the Court below was made on adequate and independent state grounds. The only complaint seems to be that the Court below has chosen in the instance of the death penalty to approach sentencing in a way that is fundamentally fair, and has decided that, in this case, the change in sentencing involves a fundamental right and, therefore, is retroactive. Wherefore, there is no jurisdiction under 28 U.S. § 1257 (a). Michigan v. Long, 463 U.S. 1032, 103 S.Ct. 3469, 77 L.Ed.2d 1201 (1983); Coleman v. Thompson, 501 U.S. ___, 111 S.Ct 2546, 115 L.Ed.2d 640 (1991); Harris v. Reed, 489 U.S. 255, 109 S.Ct. 1038, 103 L.Ed.2d 308 (1989)

REASONS FOR DENYING THE WRIT OF CERTIORARI

I. EQUAL PROTECTION IS AN INVALID ARGUMENT IN THIS INSTANCE AND IS UNAVAILABLE TO THE STATE OF OKLAHOMA AS A FEDERAL QUESTION PURSUANT TO 28 U.S.C. § 1257.

Anglo-American jurisprudence is quite clear concerning the methodology for determining whether or not there has been a violation of equal protection and, therefore a denial of due process of law by the establishment of an unconstitutional class. A case which sets forth this analysis is Pappanastos v. Board of Trustees, 615 F.2d 219 (1980, CA5 Ala.), at 220-221. The Court found:

" we must first determine the burden of justification the [challenged] classification [person].... must meet" (Cit.omit.). "The proper degree of judicial scrutiny is a function of two variables: first the nature of the right affected; and second, the identity of the plaintiff. If the classification 'interferes with the exercise of a fundamental right, or operates to the peculiar disadvantage of a suspect class, strict judicial scrutiny is then the standard of review.' (cit.omit.). Otherwise, the question is whether the classification bears 'a rational relationship to a legitimate state interest'" (cit. omit.).

The State has two problems in this Writ. First, the State wants to talk about persons convicted of crimes before a law becomes effective. The State of Oklahoma, in upholding the above equal protection analysis in State of Oklahoma v. Ballard, Case No. S-91-769, 65 OBAJ 560 (2/12/94), further states at 561; "No party has cited, and this Court is unable to find, any authority showing a person convicted of a crime, without more, is in a suspect classification." The State makes no showing that this class is a suspect one, or that it is "similarly situated" to Scott Hain's class. It is certainly outside the narrow class created by the Court in Allen v. State, 821 P.2d 371 (Okla.Cr. 1991) and Hain v. State, 852 P.2d 744 (Okla. Cr. 1993).

Second, as admitted by the State, their class is hypothetical. They allege, and there is in fact, no person in the class the State wishes to protect. The rule is clear that "It is the individual who is entitled to equal protection of the laws, and not merely a group of individuals or a body of persons..." Mitchell v. United States, 313 U.S. 80, at 97, 61 S.Ct. 873, 85 L.Ed 1201 (1941). The

State has no individual or person to protect.

Finally, equal protection is not a predicate for an action by a State. The case of Pennsylvania v. New Jersey, 426 U.S. 660, at 665, 96 S.Ct. 2333, 49 L.Ed 2d 124 (1976), states conclusively, "Claims brought by States on their own behalf cannot be predicated on alleged violations of the equal protection clause, because the equal protection clause protects people, not states."

Wherefore, the State has shown no jurisdiction pursuant to 28 U.S.C. § 1257 with its Reason I.

II. THE PETITIONER'S REASONS II AND III FAIL TO STATE JURISDICTIONAL ISSUES BECAUSE THE ISSUE OF GIVING THE LIFE WITHOUT PAROLE INSTRUCTION WAS DECIDED ON ADEQUATE INDEPENDENT STATE GROUNDS.

The rule for adequate and independent state grounds in direct appeal matters has been set forth in Michigan v. Long, 463 U.S. 1032, at 1042, 103 S.Ct. 3469, 77 L.Ed.2d 1201 (1983), and reiterated for the purposes of post conviction relief in Harris v. Reed, 489 U.S. 255, at 261, 109 S.Ct. 1038, 103 L.Ed.2d 308 (1989). The Court wrote in Harris, id., citing Long, supra., "..., if 'it fairly appears that the state court rested its decision on federal law,' this Court may reach the federal question on review unless the state court's opinion contains a "plain statement that [its] decision rests upon adequate and independent state grounds.'"

In Hain v. State, supra., at 753, the Court stated, " As discussed in Allen v. State, 821 P.2d 371 (Okl. Cr. 1991), we find no constitutional prohibition to the application of this possible sentencing option in cases where the penalty became law in the period while the offender awaited trial. " Rather than recite the passages in full here, the salient portions of the opinion of the Court in Allen, supra, are attached to this Response, as "Appendix" and incorporated herein as if pled in full. The State did not file a § 1257 appeal in Allen, and there would possibly be a waiver of those issues here. Harris, supra, and Long, supra.

Upon consideration of the extensive discussion of the Oklahoma Court of Criminal Appeals in Allen, supra, the Respondent would assert that this Court must find that there is unequivocally a

"plain statement" that the decision of the Court of Criminal Appeals rests on adequate and independent state grounds. This is particularly clear when the said Court addresses the state sentencing and weighing procedures in death penalty cases. Therefore, the Petitioner is still without jurisdiction for this Writ. The Court found in Coleman v. Thompson, 501 U.S. ____, 111 S.Ct. 2546, at 2553, 115 L.Ed.2d 640 (1991):

" This Court will not review a question of federal law decided by a state court if the decision of that state court rests on a state law ground that is independent of the federal question and adequate to support the judgement. (cit.omit.) This rule applies whether the state law ground is substantive or procedural. (cit.omit.) In the context of direct review, the independent and adequate state law ground is jurisdictional. Because this Court has no power to review a state law determination that is sufficient to support the judgement, resolution of any independent federal ground for the decision could not affect the judgement and would therefore be advisory."

CONCLUSION

The Court should deny the Petitioner's Writ of Certiorari because Equal Protection does not obtain in this case and the Court of Criminal Appeals made its decision on giving the life without parole instruction on adequate and independent state grounds. Therefore, this Court has no jurisdiction pursuant to 28 U.S.C. § 1257.

Respectively submitted,

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CERTIFICATE OF SERVICE

I, John Thomas Hall, a member of the Bar of this Court, hereby certify that one (1) copy of the foregoing Response to Writ of Certiorari was mailed, first class, postage paid, to:

Ms. A. Diane Blaylock
Assistant Attorney General
112 State Capitol Bldg.
Oklahoma City, OK 73105.

John Thomas Hall
Attorney for the ~~Petitioner~~ Respondent

Dated: March 14, 1994

NO. 93-1252

STATE OF OKLAHOMA,
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APPENDIX TO
RESPONSE TO PETITION TO WRIT OF CERTIORARI

of his rights in any manner. We have considered the entirety of the proceedings and find that the record supports a finding of malice aforethought. *State v. Durant*, 609 P.2d 792 (Okl.Cr.1980).

[5] Having considered the errors which Appellant raises in connection with our review of the trial court's denial of Appellant's request to withdraw his guilty plea, we cannot reach the conclusion that the trial court erred. The decision to allow the withdrawal of a plea is within the sound discretion of the trial court and we will not interfere unless we find an abuse of discretion. *Hopkins v. State*, 764 P.2d 215 (Okl.Cr.1988); *Vuletich v. State*, 735 P.2d 568 (Okl.Cr.1987); *Ligon v. State*, 712 P.2d 74 (Okl.Cr.1986); *Darnell v. State*, 623 P.2d 617 (Okl.Cr.1981). Insofar as Petitioner has failed to allege any irregularities which would indicate that his plea was involuntary, we cannot say that the trial court abused its discretion.

[6] With the validity of Appellant's plea established, we shift our consideration to the penalty portion of the proceedings. We find that the trial court erred when it refused to consider the possible assessment of a sentence of life without parole. Accordingly we find that the case must be remanded to the trial court for a new trial on sentencing pursuant to 21 O.S.Supp. 1990, § 701.13(E).

[7] The issue before us now concerns whether or not the application of a newly enacted, intermediate level of punishment for the offense of First Degree Murder subsequent to the commission of the offense in question would violate the prohibitions against *ex post facto* laws found in both the Constitutions of the United States and the State of Oklahoma. We find that it would not.

[8] The purpose of the rules against the passage of *ex post facto* laws, Art. I, § 10 of the United States Constitution and Art. 2, § 15 of the Oklahoma Constitution, was to assure that "federal and state legislatures were restrained from enacting arbitrary or vindictive legislation." *Miller v. Florida*, 482 U.S. 423, 107 S.Ct. 2446, 96 L.Ed.2d 351 (1987). In a criminal context, these protections apply only to laws or judicial interpretations which directly affect the punishment of the defendant. *Morris v. Meachum*, 718 P.2d 1354 (Okl. 1986). "[No] *ex post facto* violation occurs if a change does not alter 'substantial personal rights' but merely changes modes of procedure which do not affect matters of substance." *Miller*, 482 U.S. at 430, 107 S.Ct. at 2451, 96 L.Ed.2d at 360. *See also Barnes v. State*, 791 P.2d 101, 103 (Okl.Cr. 1990).

In *Miller*, the Supreme Court examined the *ex post facto* implications of changes in the Florida sentencing procedures which affected the punishment for crimes committed previous to the enactment of the changes. The Court was very specific in its definition of the purpose of the *ex post facto* clause, holding that it only applied in four very specific situations:

> 1st. Every law that makes an action done before the passing of the law, and which was innocent when done, criminal and punishes such action. 2d. Every law that aggravates a crime, or makes it greater than it was, when committed. 3d. Every law that changes the punishment and inflicts a greater punishment than the law annexed to the crime, when committed. 4th. Every law that alters the legal rules of evidence, and receives less, or different testimony, than the law required at the time of the commission of the offense, in order to convict the offender.

Id. quoting *Calder v. Bull*, 3 Dall. 386, 1 L.Ed. 648 (1798). The present case invokes concern under the third identified principle.

In *Miller*, the Court makes it quite clear that no violation occurs unless the change in the law alters "punishment beyond what was prescribed when the crime was consummated." *Id.* This holding accords with previous decisions of this Court. In *Dutton v. Dixon*, 757 P.2d 376, 379 (Okl. Cr.1988), this Court acknowledged that the rule required the finding of two elements; first, that the law was enacted subsequent to the conduct to which it was being applied; and second, " 'it must disadvantage

the offender affected by it.'" *Id.*, quoting *Miller*, 482 U.S. at 431, 107 S.Ct. at 2451, 96 L.Ed.2d at 360.

[9] Our analysis in such a case must focus on the potential punishments available for a particular act and not on the actual punishment received for the crime. *Id.* In the present case, the State admits that the change in penalty in question here did not affect the maximum or the minimum punishment to which Appellant could have been subjected. Instead, the State merely argues that the addition of an intermediate level of punishment is a substantive change rather than purely procedural, thus the prohibition applies. We cannot agree with this analysis.

There is no question that in this case consideration of the life without parole sentence is a retroactive application of a punitive statute. However, our analysis may not stop here. In order to affirm the trial court's refusal to consider this punishment, we must also find that imposition of the sentence could have disadvantaged Appellant by subjecting him to a harsher punishment than was available at the time he committed his crimes. While we will not speculate as to the comparative drawbacks between a life in prison without chance of parole and the actual imposition of the death penalty, we believe that any possibility of a sentence which avoids the death penalty cannot be said to be disadvantageous to the offender.

Accordingly, we find that the trial court's refusal to consider the possibility of imposing a sentence of life without parole provision under the provisions of 21 O.S.Supp.1987, § 701.10 was error. This result is even more compelling in the present case, wherein the Petitioner urged the court to consider the sentence and executed a valid waiver of his constitutional right against the application of any ex post facto law. The waiver of this right is just as valid as the waiver of any of the other constitutional protections given up in connection with a plea of guilty.

Our next consideration must be how the error may be rectified. It is true that in cases where the sentence is death, this Court has a wide spectrum of authority in conjunction with its appellate powers. In addition to the general power to "reverse, affirm or modify the judgment appealed from" provided in 22 O.S.1981, § 1066, the legislature enacted specific powers as a part of the capital sentencing procedures which control in death penalty cases. We are charged, in 21 O.S.1981, § 701.13, with determining, inter alia, "whether the sentence of death was imposed under the influence of passion, prejudice, or any other arbitrary factor." On the record before us, we must conclude that the trial court's error of law concerning the available sentencing options must be construed as an arbitrary factor, which has a negative impact on the validity of the death sentence.

It has long been recognized that a system of capital punishment must meet strict constitutional requirements to be upheld. The primary goal of any such system must be the allowance of individualized sentencing tempered by a controlled amount of discretion, exercisable by the trier of fact. *See generally, Gregg v. Georgia*, 428 U.S. 153, 96 S.Ct. 2909, 49 L.Ed.2d 859 (1976); *Furman v. Georgia*, 408 U.S. 238, 92 S.Ct. 2726, 33 L.Ed.2d 346 (1972). In the present case, we are presented by a situation where the sentencer did not fully understand the options available, thus rather than the more usual case involving "unbridled discretion," we have just the opposite. The trial court committed no less an error, however, when it took such a restricted view of its sentencing options that it failed to allow Petitioner the full benefit of all the sentences provided by law.

We considered a similar sentencing problem in *Walker v. State*, 780 P.2d 1181 (Okl.Cr.1989). In that case, we held that when the trial court did not recognize the extent of its legal authority to fashion a proper punishment, it cannot be said that it had properly exercised its discretion. We held that when the trial court has operated under a mistaken impression of law, the case must be remanded for resentencing. We find that to be the appropriate remedy in this case.

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This Court has recognized, as has the Supreme Court, that many of the errors in capital cases may be found either to be harmless in light of the totality of the record on appeal, or that in the case of an invalid aggravating circumstance, reweighing by the appellate court may indicate that the death sentence would still have been given notwithstanding the absence of the invalid aggravator. *See Clemmons v. Mississippi*, 494 U.S. 738, 110 S.Ct. 1441, 108 L.Ed.2d 725 (1990). *See also Castro v. State*, 745 P.2d 394 (Okl.Cr.1787), *cert. denied*, 485 U.S. 971, 108 S.Ct. 1248, 99 L.Ed.2d 446 (1988), on reh. 749 P.2d 1146 (Okl.Cr.1987), *cert. denied* 485 U.S. 971, 108 S.Ct. 1248, 99 L.Ed.2d 446 (1988); *Stouffer v. State*, 738 P.2d 1349 (Okl.Cr. 1987), *on rehearing*, 742 P.2d 562 (Okl.Cr. 1987), *cert. denied* 484 U.S. 1036, 108 S.Ct. 763, 98 L.Ed.2d 779 (1988). In the case before us now, however, we cannot say that the error is harmless. Much testimony was presented concerning the ramifications of a life sentence. The trial court indicated that it chose the death sentence specifically for the purpose of keeping Petitioner in prison forever. We cannot predict what effect the third option of life without parole may have had on the sentence pronounced. Likewise, our ability to reweigh is not implicated here. We are not concerned with the finding that one of the aggravating circumstance, and its attendant evidence, should not have been considered by the trial court. We are instead faced with a situation where the court fell short of considering all available options. Reweighing the aggravating and mitigating evidence provides no guidance as to whether the trial court would have opted for a sentence of life without parole had it so considered. Although we find that Appellant's murder conviction is AFFIRMED, we find that our only viable option is to REMAND THE CASE FOR A NEW TRIAL ON SENTENCING, with the court giving proper consideration to all three possible punishments for the crime of First Degree Murder; Life in Prison, Life in Prison without the Possibility of Parole and the Death Penalty.

BRETT and JOHNSON, JJ., concur.

PARKS, J., specially concurs.

LUMPKIN, V.P.J., concurs in result.

PARKS, Judge, specially concurring:

This Court established guidelines for the taking of guilty pleas in *King v. State*, 553 P.2d 529 (Okl.Cr.1976). It continues to be the opinion of this writer that the *King* directives should be followed step by step whenever a plea of guilty or nolo contendere is entered. *Ocampo v. State*, 778 P.2d 920, 925 (Okl.Cr.1989) (Parks, P.J., concurring in part/dissenting in part). If they were, most of the questions concerning reliability of these pleas would be eliminated. Compliance with *King* "best expedites the interests of justice and promotes finality by foreclosing state and federal collateral attacks." *Ocampo*, 778 P.2d at 925. On the basis of *stare decisis*, however, I must yield my view to that of the majority of this Court and apply the standards set forth in *Ocampo*. Having done this, I concur in the instant case.

DENIAL OF PETITION FOR REHEARING

The State of Oklahoma has requested that this Court grant rehearing in the above captioned case on the basis that the decision to remand the case for resentencing runs afoul of the section of the Oklahoma statutes which prohibits retroactive application of statutes without specific authority from the legislature, 22 O.S.1981, § 3. The death sentence meted out to Allen by the jury was reversed by this Court and remanded to the trial court in order that consideration could be made as to all the appropriate punishments, including the option of life without parole. The State contends that this result is improper in that Section 3 of Title 22 prohibits retroactive application of newly passed or revised statutes.

[10] We disagree with the State's conclusion and hold that the provisions of Section 3 are applicable only to Title 22. In Section 1 of Title 22, the Legislature provided that "[t]his Chapter shall be known

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March 14, 1994

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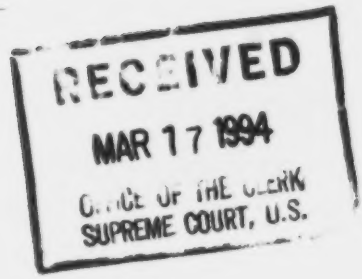

RE: Oklahoma v. Hain,
NO. 93-1252

Dear Mr. Sutter:

Enclosed is the Response to Writ of Certiorari. Please, file the Response and return a file stamped copy.

Thank you.

Sincerely,

John Thomas Hall